Local 3, International Brotherhood of Electrical Workers, AFL-CIO *and* Kidder Peabody & Co., Inc. Case 2-CC-1799

31 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 27 February 1984 Administrative Law Judge Thomas T. Trunkes issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 3, International Brotherhood of Electrical Workers, AFL-CIO, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge. The above proceeding was heard in New York, New York, on September 21, 22, and 23, 1983, on a charge filed by Kidder Peabody & Co., Inc., herein Kidder. The Regional Director for Region 2, on June 28, 1983, issued a complaint pursuant to Section 10(b) of the National Labor Relations Act. The complaint alleges that Local 3, International Brotherhood of Electrical Workers, AFL-CIO, herein the Union, the Respondent, or Local 3, in furtherance of its dispute with GTE Telenet Information Services, Inc., herein GTE,[1] picketed Kidder's premises at 10 Hanover Square, New York, New York, with the object of forcing or requiring GTE to cease doing business with MTTR, Inc., herein MTTR, and/or to force or require Kidder to cease doing business with GTE, and/or to force or require Consolidated Electrical Construction Co., herein Consolidated, and Interconnect Planning Corp., herein Interconnect, to cease doing business with Kidder. By the above acts, the complaint alleges that the Respondent has induced and encouraged individuals employed by Consolidated, Interconnect, Kidder, and MTTR to engage in a strike or refusal, in the course of their employment, to use, manufacture, transport, or handle goods, articles, materials, or commodities or to perform services, and that the Respondent has threatened, coerced, and restrained Consolidated, Interconnect, Kidder, and MTTR in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

The Respondent filed an answer which admitted picketing, but denied that the picketing was in furtherance of an unlawful objective. In its defense the Respondent alleged that MTTR is the alter ego of GTE and that the picketing was at all times directed at GTE, the primary employer.

All parties were represented and participated at the hearing, and had a full opportunity to adduce evidence, to examine and cross-examine witnesses, to file briefs, and to argue orally. Counsel for the General Counsel, herein the General Counsel, and the Respondent filed briefs which have been carefully considered.

The issues raised in this proceeding are as follows.

1. Whether MTTR was an alter ego of GTE.

2. Whether the picketing at 10 Hanover Square was directed at primary or secondary employers.

On the entire record, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

GTE, a Delaware corporation engaged in the business of supplying financial information to the brokerage and financial community, had its principal place of business in Mt. Laurel, New Jersey. Stephen Beebe, the former assistant general manager and controller for GTE, testified, without contradiction, that in 1983 GTE sold its services for in excess of $500,000 and that in 1983 GTE purchased goods valued in excess of $50,000 from points outside the State of New Jersey which were shipped to New Jersey. The complaint alleges, the record reflects, and I find that GTE was, at all times material herein, a person and employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act.

Kidder is a Delaware corporation with offices and a principal place of business in New York, New York. At all times material herein, Kidder has been engaged in the securities brokerage business. Annually Kidder, in the course and conduct of its business, receives gross reve-

[1] GTE is a huge conglomerate encompassing a multitude of subsidary corporations, divisions, and companies. Throughout this decision reference to GTE, without further explanation, will mean GTE, Telenet Information Systems, the subsidiary corporation with whom Local 3 had a labor dispute. Any references to other subsidiaries or subdivisions of GTE will be made by using that company's full name.

nues in excess of $500,000 and purchases and receives at its New York facility products, goods, and materials valued in excess of $50,000 from points outside the State of New York. The complaint alleges, the Respondent admits, and I find that Kidder is a person and employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act.

Consolidated is a subcontractor which, at the time of the picketing, was performing electrical work for Kidder at two of its New York City locations, including 10 Hanover Square. Interconnect is a contractor which was engaged by Kidder at the time of the picketing to perform telephone interconnect services at 10 Hanover Square. The complaint alleges, the Respondent admits, and I find that, at all times material herein, Consolidated and Interconnect have been persons engaged in commerce and in an industry affecting commerce within the meaning of Section 2(1), (6), and (7) of the Act.[2]

II. THE LABOR ORGANIZATION

The complaint alleges, the Respondent admits, and I find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

GTE provided a service to brokerage houses and other financial institutions by furnishing news, stock quotes, and other information through a nationwide communications network. The two divisions which comprised GTE were the financial service division, which delivered the financial information to customers, and the service division, which maintained, installed, and modified the hardware and equipment over which the information was transmitted to the customers' offices. Only the service division is involved in the labor dispute herein.

In April 1983, GTE's service division employed approximately 195 workers nationwide. These employees were divided up by GTE into geographic districts. Since 1971 GTE's approximately 28 field engineers in District 781, an area encompassing the 5 counties of New York City, northern New Jersey, Fairfield County, Connecticut, and all of Long Island, were represented by Local 3. As of 1980, the Respondent also represented the approximately 26 field engineers of District 782, an area stretching from Maine to northern Virginia, including upstate New York. No other GTE employees were represented by the Respondent. The collective-bargaining agreements between Local 3 and GTE, covering Districts 781 and 782 respectively, were both due to expire on May 10, 1983.

A big bone of contention between the Union and GTE related to the Union's drive to acquire "Telenet" work for its membership. Telenet work was apparently contracted out to GTE by GTE Telenet Communications Corp., another member of the GTE family of corporations. Telenet work involved servicing a different type of equipment from that which GTE engineers normally worked on.

Conflict over Telenet work erupted full scale in 1980, immediately after the Union was certified by the Board as the bargaining agent for District 782. The Union struck, the principal issue being the right of field engineers to perform Telenet work. Six months later, the strike was resolved with an agreement that field engineers in Districts 781 and 782 would perform a certain portion of Telenet work. Controversy surrounding Telenet work persisted, however, and in 1983 24 of 29 grievances pending between GTE and the Union were Telenet related.

The amount of Telenet work actually performed by Districts 781 and 782 employees is in dispute. John Crowley, the Union's business agent, testified that the field engineers spent more than one-third of their time doing Telenet work and that he arrived at this figure after questioning and examining the records of 95 percent of the employees in the two districts.

Philip Ryan and Joel Liebesfeld, two field engineers, both testified that they personally spent at least one-third and possibly between 40–50 percent of their time performing Telenet work. Neither employee testified as to how much time their coworkers spent on Telenet work. Liebesfeld also testified that GTE had sent him to a school in Mt. Laurel, New Jersey, where he learned to service Telenet equipment.

By contrast, Stephen Beebe testified that Telenet work comprised only about 10 percent of the total workload for the field engineers of Districts 781 and 782, a figure which he obtained from internal financial documents. Similarly, Rudolf Haydu, the former director of field engineering for GTE and current president of MTTR, testified that approximately 10 percent of the field engineers' work, both nationwide and in Districts 781 and 782, was Telenet work.

Despite the fact that neither Haydu nor Beebe could point with precision to the sources from which they derived the 10-percent figure, I credit them. As managers within GTE they, of all the witnesses who testified on this point, were in the best position to know how much Telenet work most of the employees performed. Moreover, Ryan and Liebesfeld had no knowledge as to what other employees were spending their time on, and Crowley's estimate was based on the hearsay statements of his membership rather than on personal knowledge.

B. *The Formation of MTTR*

The essential facts surrounding the formation of MTTR are not in dispute. Haydu testified that, on February 3, 1983,[3] two of his superiors at GTE informed

[2] The Respondent denied the allegation in the complaint that MTTR is an employer under the Act and there is no evidence in the record to support the allegation. However, in light of my findings as to GTE, Kidder, Interconnect, and Consolidated, I find that there is an ample basis to support jurisdiction. See *Plumbers Local 460 (L. J. Construction)*, 236 NLRB 1435, 1436 fn. 2 (1978).

[3] All dates refer to the year 1983 unless otherwise specified.

him that the Company had, for financial reasons, decided to divest itself of its service division. After being informed, at the February 3 meeting, that GTE was conducting negotiations with New Corp. Products, Inc., Haydu asked if he would be given an opportunity to purchase the service division. He repeated this request the following day to David Hand, the president of GTE. Hand agreed that Haydu could negotiate for the service division, but asked Haydu not to discuss the deal until other principals had been selected. Haydu decided on three partners, all of whom were agreeable to Hand, and negotiations for the sale commenced in mid-February and lasted through April 29. In all, 15 or 20 meetings were held between GTE and Haydu and his partners. By the fourth of fifth meeting the latter group had retained an attorney who participated in the remaining negotiations on its behalf.

MTTR was incorporated in the State of New Jersey, and on April 29 it purchased all the assets of GTE's service division.[4]

The four principals of MTTR were the stockholders, directors, and officers of the company. Haydu's three partners, like him, were all former managers at GTE. Tom Greaney, formerly the manager of the field support group at GTE, became the vice president of eastern operations of MTTR with total responsibility for the installation and modification of equipment. Mike Ferguson had been GTE's district manager in Chicago and became the vice president of western operations at MTTR. Tom DiGrangi, another district manager at GTE, became the vice president of marketing and field support at MTTR.

Under the contract of sale between GTE and MTTR, MTTR agreed to assume GTE's collective-bargaining agreement with Local 3 and GTE agreed to use reasonable efforts to make its employees available to MTTR. According to Haydu's uncontradicted testimony, MTTR offered employment to almost all of GTE's approximately 195 employees and more than 170 of them accepted.[5] All but one of District 782's employees went to work for MTTR, while in District 781 only six accepted the offer of employment.

C. *Events Leading to the Labor Dispute and the Picketing at the Kidder Premises*

1. Exchanges between the Respondent and MTTR

It is undisputed that the Union learned of the sale of GTE's service division to MTTR sometime in early April. When Haydu informed Crowley of the sale he noted that the collective-bargaining agreement was due to expire in May and proposed that the parties commence negotiations. By Crowley's own account he flatly refused to negotiate with MTTR, having determined that MTTR was a dummy set up to get the union contracts and workers away from Telenet work. Crowley apparently based this opinion on information he obtained from MTTR's attorney, Gaetano DeSapio, that MTTR would not be performing any Telenet work,[6] nor would they provide a pension package. Crowley also testified that his suspicions were aroused because MTTR refused to produce documents relating to its contract with GTE.[7]

Correspondence between Norman Rothfeld, the Respondent's counsel, and DeSapio between April 14 and May 27 also indicates that the Respondent knew of the sale but refused to neogtiate with MTTR, having concluded it was an alter ego of GTE. In a reply letter dated April 20, DeSapio proposed that the parties meet to negotiate. Rothfeld answered by expressing his opinion that the sale of the service division was a sham and stressed that MTTR's refusal to show the Union documents relating to its "assets, identify, or prospects" reinforced the Union's view. DeSapio responded on April 27 by attempting to assure Rothfeld that MTTR was not an alter ego of GTE. With respect to the documents requested by Rothfeld. DeSapio replied:

> As MTTR has indicated before, MTTR is not prepared to disclose to you its internal finances or the financial details of its arrangements with third parties, including GTE. MTTR is prepared to share with you evidence of our corporate status, and such documents as may be required under the National Labor Relations Act. MTTR specifically retains its right to withhold financial information and other documents which it is not required to disclose to Local 3 under the N.L.R.A.

Receiving no reply from Rothfeld, DeSapio sent Rothfeld another letter expressing MTTR's concern over the Union's refusal to negotiate. Rothfeld on May 19 responded by reaffirming the Union's position that MTTR was a dummy corporation and reiterating his demand that MTTR furnish the Union with proof of its independent existence. In closing, Rothfeld noted that the validity of the Union's position would be established through litigation. DeSapio's bristling response on May 27 indicated that MTTR would henceforth interpret the Union's persistent refusal to bargain as a lack of interest in the bargaining unit.

2. The picketing

Kidder was a GTE customer that used GTE equipment in all its three New York City locations, including 10 Hanover Square. Prior to April 30 this equipment was also serviced by GTE. In early May Kidder received a communication from GTE advising it that henceforth MTTR would service Kidder equipment. There is no indication in the record that Kidder ever received any communication directly from MTTR.

[4] On August 1 GTE sold the remainder of its assets, i.e., its financial service division, to Automatic Data Processing, Inc., herein ADP. ADP bought 100 percent of GTE's stock. As a result of the sale, it owned all of GTE's leased equipment.

[5] In a mailgram MTTR reminded workers that a refusal to accept its offer of employment would be treated as a voluntary resignation.

[6] The record indeed indicated that GTE did not contract any Telenet work to MTTR.

[7] Crowley testified that the Union eventually gained access to the agreement between GTE and MTTR through a court order. It is unclear from the record, however, when the order was issued or in what context the proceeding arose.

Picketing at the Kidder premises at 10 Hanover Square began on May 25.[8] According to Crowley, who ordered the picketing, the action was precipitated by the presence at the site of James Talmadge, a former GTE employee who had accepted MTTR's offer of employment and whose job it was to service GTE equipment at Kidder.[9] The reason behind the picketing was, in Crowley's words, that GTE had "locked out" its employees. Apparently, the Union construed as a lockout GTE's direction to employees that they "transfer" to MTTR or lose their jobs.

At the time the picketing started Kidder was undergoing renovations at its 10 Hanover Square location. Consolidated was performing electrical work and Interconnect was working on the telephone equipment. Linn Bailey, Kidder's vice president of fundamental administration, testified that after the picketing commenced Consolidated workers ceased doing electrical work and Interconnect stopped servicing the telephones.

The picketing lasted until June 15 and was conducted in front of both entrances to the 10 Hanover Square building. Early in the morning there were four or five pickets. During lunchtime the number of pickets increased to about 50 and in the afternoon the number of pickets declined again.

Kidder responded to the picketing by immediately seeking relief at the National Labor Relations Board. The Regional Director for Region 2 obtained a temporary restraining order on June 10. When the picketing did not cease by June 15, the United States District Court, by Judge Conner, issued an order of civil contempt which ended the picketing.[10]

D. *Discussion and Analysis*

1. The contention of the parties

The General Counsel contends that the Respondent transgressed the standards for common situs picketing established in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950), by picketing at a time when GTE, the primary employer, had been absent from the job for a period of weeks, thus evidencing an intent to picket the neutral employers on the site.

The Respondent defends on the grounds that MTTR was present at 10 Hanover Square through the presence of James Talmage and that, as the alter ego of GTE, MTTR was the primary employer. Alternatively, the Respondent argues that, even assuming that MTTR was not, in fact, the alter ego of GTE, the Union picketed in the good-faith belief that there was an alter ego relationship. Furthermore, the Respondent contends that this belief was justified in light of MTTR's failure to turn over proof of its independence and because at the time of the picketing there were few indicia of independent ownership.

2. Compliance with *Moore Dry Dock* standards

Two elements establish a violation of Section 8(b)(4)(i) and (ii)(B) of the Act. There must be coercive or threatening conduct, the object of which is to force or require a neutral employer to cease doing business with another person. *Teamsters Local 208 (DeAnza Delivery)*, 224 NLRB 1116, 1119 (1976). In the case at bar it is undisputed that the Union engaged in picketing at Kidder's 10 Hanover Square premises. The sole issue is whether the Union instituted the picketing with an unlawful secondary objective.

Because Local 3 picketed at the site of a neutral employer, Kidder, the standards articulated in *Moore Dry Dock*, supra at 549, apply here. In that case the Board held that:

> When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

While the Board has consistently stressed that the *Moore Dry Dock* standards are not to be mechanically applied, *Operating Engineers Local 450 (Linbeck Construction)*, 219 NLRB 997, 998 (1975), enfd. 550 F.2d 311 (5th Cir. 1977), failure to comply with those standards creates the presumption that the picketing was conducted with an unlawful objective. *DeAnza*, supra at 1121. Specifically, the Board has held that "[t]he criteria established in *Moore Dry Dock* . . . to delineate primary from secondary picketing requires, inter alia, that picketing be conducted only when the primary employer is present at the jobsite. Its violation raises a presumption of unlawful motive." *Sheet Metal Workers Local 80 (Ciamillo Heating)*, 268 NLRB 4 (1983). See also *Carpenters Local 102 (Sigmadyne Corp.)*, 241 NLRB 392 (1979) (picketing when the union was fully aware that the primary was not present transgressed the *Moore Dry Dock* standards from which the administrative law judge, with Board approval, concluded the object of the picketing was secondary).

[8] Crowley testified that picketing took place at other locations as early as May 11, but these incidents have not been alleged herein as unfair labor practices and are not material to the issues raised in the complaint.

[9] Talmadge was brought up on charges, fined, and expelled from the Union after going to work for MTTR. The Union's position on MTTR was made clear to the six District 781 employees who elected to work for MTTR on June 6 when the Union sent them each a mailgram advising them that they no longer worked for an affiliated employer and that they should report to the Union for employment assignments.

[10] On June 15, Kidder sent a letter to Local 3 advising the Union that access of MTTR employees to Kidder's premises would be limited to the hours between 5 and 7 a.m. and between 6 and 10 p.m., Monday through Friday. Kidder emphasized that this action was intended as an accommodation to the Union and in no way conceded the lawfulness of the picketing.

The resolution of the case at bar rests on whether the primary was present at the site of the picketing and consequently whether MTTR was, in fact, the alter ego of GTE. If MTTR was not GTE's alter ego then a presumption that the Union picketed with an unlawful objective is raised, a presumption that is not rebutted by any evidence in the record.

3. The relationship between GTE and MTTR

The Respondent points to a long list of facts in support of its contention that the sale of GTE's service division to MTTR was a sham. Specifically, the Respondent notes the following:

1. MTTR was permitted use of GTE's premises rent free for a limited period and there is no evidence as to when precisely MTTR designated its office space as its own with signs.

2. Local 3 field engineers who transferred to MTTR continued to have their health and welfare claims processed under GTE's policy with Travelers Insurance Co. They also retained their GTE pension rights.

3. MTTR continued to deduct from its employees' wages amounts which were transmitted to GTE's credit union.

4. MTTR continued to use GTE's seniority list for all purposes.

5. MTTR refused to show the Union evidence of its independent status.

6. GTE accountants continued to issue paychecks to technicians transferred to MTTR after the alleged sale.

7. MTTR is and must continue to be owned by four former GTE managers. None of the four may sell their stock nor may MTTR issue new stock.

8. GTE may assign its contracts to MTTR without MTTR's consent. All of the MTTR customers, with the single exception of Darome, Inc., were former GTE customers who used GTE equipment.

9. All of MTTR's equipment and personnel were obtained from GTE.

10. GTE ceased giving any Telenet work to Local 3 members because no Telenet work is or will be assigned to MTTR.

Despite the fact that many of these points may be, at least on the surface, indicative of an alter ego relationship, I find that MTTR was an independent organization. In evidence is a lengthy contract of sale between MTTR and GTE and a plethora of supporting documents. In addition, both Beebe and Haydu testified extensively as to the financial and other arrangements between GTE and MTTR. This testimony and documentary evidence reveal the following.

a. *Ownership of MTTR*

MTTR bought the assets of the service division of GTE, including equipment and office furniture, for a purchase price of $231,000.[11] Ten percent of the purchase price was paid in cash at the time of closing and a note guaranteed personally by the principals and secured by a purchase money security interest in all the assets sold covered the remainder. By the time of these proceedings the note had been paid in full.

Restrictions on stock ownership lasting 2 years were incorporated into the contract of sale. Beebe plausibly explained that GTE sought to ensure that its customers were properly serviced during the first 2 years of MTTR's existence. As a result the shareholders are prohibited from selling their stock to outsiders, although they can apparently sell to each other and to MTTR. Similarly, MTTR is prohibited from issuing new stock.

It is clear from the record there was no co-ownership between GTE and MTTR. Nor was there an interchange of employees after the sale and the transition period were concluded.

b. *MTTR's business obligations and marketing strategy*

Pursuant to the sale of the service division, MTTR assumed GTE's service obligations. MTTR renegotiated certain contracts in its own name. Under the contract between GTE and MTTR, GTE could assign to MTTR any of its obligations and the latter would be required to honor them.

As of the date of these proceedings about 90 percent of MTTR's business was obtained directly or indirectly through GTE,[12] although there were no restrictions in any agreement between the parties as to with whom MTTR would do business.

MTTR solicited business through its marketing and sales department located in Trehouse, Pennsylvania. An account MTTR independently obtained was Darome, Inc., a corporation which manufactured equipment different from the GTE equipment. An employee of GTE was also helping MTTR negotiate the Social Security System (Satar) contract in its own name.

c. *Office space*

MTTR occupies various premises throughout the United States. Included in the contract of sale with GTE were various provisions regarding MTTR's use of GTE office space.

When it commenced business, MTTR had use of GTE's Mt. Laurel, New Jersey headquarters for up to 6 months, rent free. By the time these proceedings took place MTTR's headquarters were in its own leased facility in Trehouse, Pennsylvania.

MTTR also used other GTE locations around the country rent free until its own facilities could be established. In Boston, Springfield (Virginia), Cleveland, and New York City MTTR used GTE's premises rent free until it obtained its own space. At the time of these proceedings MTTR was still using GTE space in New York

[11] There is nothing in the record to indicate that this was anything but a fair price.

[12] There is some evidence in the record that the Navy Federal Credit Union account, which Haydu in his testimony included in the 10 percent of the business which MTTR independently obtained, was at least indirectly secured through GTE, which serviced the account prior to MTTR.

City but had plannned to move to its own offices several blocks away by October. In Kansas City, Los Angeles,[13] Dallas, Walnut Creek (California),[14] and Miami, MTTR leased premises from GTE and paid rent. There is no indication in the record that at any time GTE premises at these locations were used rent free.

d. *Labor relations and employee benefits*

The contract of sale provided that employees who transferred to MTTR and had been participants in GTE's savings, investment, and pension plans would become vested in all. Pension rights would in no way be affected by an individual's length of service at MTTR.

Immediately after the sale Local 3 members who transferred to MTTR were covered by the same Travelers Insurance contract which had covered them while they were on the GTE payroll. On August 1, MTTR bought its own health and welfare policy with Aetna Insurance Co.

GTE agreed to issue checks for MTTR on its payroll for several weeks after the sale until MTTR was able to establish its own. In addition, GTE allowed MTTR access to its accounting staff during the transition period.[15] MTTR also continued to deduct moneys from its employees' paychecks for transmittal to GTE's Federal Credit Union at which MTTR's employees apparently remained members even after the sale and transition period.

In regard to labor relations, MTTR was willing to recognize the Union and adhere to the collective-bargaining agreements until they expired on May 10. Additionally, MTTR continued to use GTE's seniority list minus the employees who had not transferred.

While the circumstances surrounding the MTTR sale are in some instances indicative of an alter ego relationship under the Board's alter ego doctrine, the overwhelming weight of the evidence suggests that the sale was legitimate and established MTTR as a separate, independent entity.

In determining whether two business entities are alter egos, the Board has developed a list of factors, none of which taken alone is the sine qua non of alter ego status. These factors are:

> . . . common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market"; as well as the nature and extent of the negotiations and formalities surrounding the transaction.

Fugazy Continental Corp., 265 NLRB 1301, 1301-1302 (1982).[16] Additionally, the Board will consider whether the "purpose behind the creation of the alleged *alter ego* was legitimate or whether, instead, its purpose was to evade responsibilities under the Act." *Fugazy*, supra at 1302.

In the case at bar it is certainly true that MTTR and GTE had a common business purpose, and that they serviced the same customers and operated in the same market, but the indicia of alter ego status ends there. The record is clear that there was no common ownership between the enterprises and no interchange of employees after the initial transfer of employees to MTTR. Nor is there any evidence that GTE was at any time involved in MTTR's financial, business, or supervisory decisions.

The events surrounding the sale clearly suggest an arm's-length transaction. Each side was represented by its own counsel and was aided by an independent accounting staff. A sizeable down payment (10 percent of the purchase price) was paid outright. The rest of the price was covered by a secured loan which has since been paid. All the transactions between MTTR and GTE are documented by formal legal documents.

The fact that MTTR managed to negotiate accommodations for itself, such as use of GTE's premises during the transition period, and for its employees, such as vesting rights in GTE's pension plan, in no way detracts from MTTR's independent status. These were simply privileges negotiated for by an arm's-length purchaser, the cost of which was built into the purchase price. Nor is there anything sinister in GTE's attempt to protect its substantial interest in seeing that its contracts were adequately serviced by MTTR by building stock transfer restrictions into the agreement.

Finally, there is a scarcity of evidence that the sale to MTTR was motivated by a desire to avoid the Union or to avoid giving union members Telenet work. Although it is clear from the record that the Telenet problem was a thorn in GTE's side, the problem only affected a relatively small number of workers, the approximately 55 District 781 and District 782 workers out of a nationwide GTE work force of 195. In addition, as I have credited that most of the Local 3 employees only spent 10 percent of their time doing Telenet work, the problem clearly had a relatively minor impact on GTE as a whole. It is hard to believe that GTE would go to all the trouble of setting up an elaborate pretense simply to avoid giving union workers Telenet work. MTTR's apparent readiness to negotiate with Local 3 belies any suggestion that GTE created a dummy corporation in order to avoid dealing with the Union.

In sum, this case provides a sharp contrast to the cases in which the Board found that the sale of a division or part of a business to former employees was a sham. Cf. *Scott Printing Corp.*, 237 NLRB 593 (1978), revd. on other grounds 612 F.2d 783 (3d Cir. 1979) (printing

[13] At the time of these proceedings, MTTR paid rent on a prorated basis to GTE, but had plans to move to more suitable facilities.

[14] At the time of these proceedings these premises were being leased by MTTR directly from the landlord.

[15] Haydu testified that MTTR had hired its own independent accounting firm before the sale to assist in the negotiations.

[16] See also *Edward J. White, Inc.*, 237 NLRB 1020, 1025 (1978); *Co-Ed Garment Co.*, 231 NLRB 848, 855 (1977) (alter ego question turns on whether "'the two enterprises have substantially identical management, business purpose, operations, equipment, customers and supervision, as well as ownership,' so that the 'new' employer may be said to constitute 'merely a disguised continuance of the old employer'"); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976) ("[c]learly each case must turn on its own facts, but generally we have found *alter ego* status where the two enterprises have 'substantially identical' management, business purpose, operations, equipment, customers, and supervision as well as ownership").

shop's sale of its composing room to former employees held a sham: buyer received work strictly at the pleasure of the seller, small initial investment, transaction completed without buyer obtaining independent counsel, seller retained supervisory authority, purpose of sale was to avoid bargaining with the union); *Big Bear Supermarkets #3*, 239 NLRB 179 (1978), enfd. 640 F.2d 924 (9th Cir. 1980) (Board held that sale by supermarket chain of single store to a former manager was a sham, noting that a family relationship was involved, there was a minimal initial investment, seller retained right to make management and supervisory decisions, and seller advanced to the buyer operating costs interest free).

E. *The Union's Good-Faith Belief in the Alter Ego Relationship*

The Respondent argues that it reasonably and in good faith believed that MTTR was GTE's alter ego. With some justification, the Respondent also points out that in light of MTTR's use of GTE's premises, services, and facilities during the transition period it was far from apparent at the time of the picketing that MTTR was indeed independent.

The Respondent's belief in the alter ego relationship, however justified, does not sanction the picketing. In the recent case of *Painters Local 829 (Theater Techniques)*, 267 NLRB 858 (1983), the Board held that the General Counsel does not have to prove as part of his prima facie case that the union had knowledge of the employer's right to control. The Board made it clear that its holding was not limited to right-to-control cases:

> [W]e cannot conclude that the Act's purposes would be well served by finding that a union has lawfully applied coercive pressure to a neutral employer in cases where the General Counsel cannot affirmatively establish the union's knowledge of the employer's neutrality. [Id. at 861.]

In *Theater Techniques*, supra at 861–862, the Board went on to say:

> This is not to say, however, that a union's lack of knowledge is not encompassed at all in the Board's totality-of-the-circumstances test. Indeed, there may be some extraordinary circumstances in which a union may counter the General Counsel's *prima facie* showing by establishing that it made reasonable good-faith efforts to ascertain whether the employer on which it exerted pressure was a neutral employer and that it was denied access to this information or deliberately misled.
>
> We place this high burden on a respondent union for several reasons. Most importantly, without the requirement of proof of deception or inaccessibility of information as to an employer's neutrality, the defense of lack of knowledge would be too conveniently raised and too readily taken advantage of. We must require from a union raising such a defense more than the bare assertion of lack of knowledge. Rather, a union must provide evidence that before it exerted pressure it attempted, but was unable, to find out whether the party to be pressured was a proper target for such pressure; i.e., a nonneutral employer. These facts, unlike a union's subjective intent, are susceptible to objective proof. And, particularly since the union is in the best position to establish the nature of its inquiry into the neutrality of the employer, placing the burden of adducing such evidence on the union cannot be said to be an unduly onerous burden. We emphasize that we do not envision that the instances in which this defense will be found meritorious will be many.

The Respondent argues that it was deliberately denied access to vital information by MTTR in the face of its repeated requests for proof of MTTR's independent status. I find, however, that the Respondent has not met the high burden of proof established in *Theater Techniques*. MTTR neither misled the Union nor flatly denied it any relevant information. On the contrary, in offering to negotiate, MTTR stated that the Union could have access to documents it was entitled to under the Act. By spurning all of MTTR's efforts to bargain the Respondent itself closed off avenues for obtaining information. Moreover, it is clear from Crowley's own testimony that the Respondent had characterized the sale of MTTR as a sham immediately upon learning of it. Its assertion that MTTR was required to prove its independence at precisely the time and in the exact manner the Union requested is simply without any basis in law.

Mootness

The Respondent's final argument is that since GTE has ceased doing business, having sold all of its remaining assets to ADP, the Union no longer has a labor dispute with any party and the proceedings herein are moot.

I reject this argument. The Board and the courts have consistently held that a mere change in circumstances does not render unfair labor practice proceedings moot, even if at first blush the controversy appears to have been settled. See *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1950) (employer's subsequent compliance with a Board Order does not deprive the Board of the right to seek enforcement); *Construction Erectors*, 265 NLRB 786 fn. 6 (1982) (respondent's discontinuance of business does not render moot the unlawful conduct alleged against it); *Hollander Home Fashion Corp.*, 255 NLRB 1098 fn. 3 (1981) (offending party has attempted to remedy unfair labor practice).

In the case at bar the Respondent has not demonstrated that a Board Order would be futile, absurd, or unenforceable. Accordingly, I find the need for a remedy has not been obviated. See *Grede Foundries*, 628 F.2d 1, 7 (D.C. Cir. 1980), enfg. 235 NLRB 363 (1978).

CONCLUSIONS OF LAW

1. GTE Telenet Information Services, Inc. and Kidder Peabody & Co., Inc. are persons and employers engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(1), (2), (6), and (7), and 8(b)(4) of the Act.

2. Consolidated Electrical Construction Co. and Interconnect Planning Corp. are persons engaged in commerce and in industries affecting commerce within the meaning of Section 2(1), (6), and (7) and Section 8(b)(4) of the Act.

3. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

4. By engaging in picketing at 10 Hanover Square with the object of forcing and requiring Kidder to cease doing business with GTE and forcing and requiring Interconnect and Consolidated to cease doing business with Kidder, Local 3 has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices I recommend that the Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

The General Counsel has requested a broad order, citing the Respondent's "proclivity for engaging in unlawful secondary boycott" or "a general scheme to violate the Act." In the case at bar, however, I find that a broad order is not warranted.

Unlike the unions in *Electrical Workers IBEW Local 3 (L. M. Ericsson Telecommunications)*, 257 NLRB 1358 (1981), and in *Service Employees Local 73 (Andy Frain, Inc.)*, 239 NLRB 295 (1978), both cited by the General Counsel in support of his request for a broad order, the case at bar did not involve flagrant and willful violations of the Act.[17] The Respondent proceeded with the picketing on the plausible, if mistaken, assumption that MTTR and GTE were alter egos.

Moreover, the picketing in the case at bar did not represent a union policy or a repeated response to a common set of circumstances. The Respondent's reaction to the MTTR sale was rather a peculiar response to a peculiar set of circumstances which are unlikely to be repeated in other contexts. Cf. *L. M. Ericsson*, supra; *Andy Frain*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Local 3, International Brotherhood of Electrical Workers, AFL–CIO, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from inducing or encouraging any individual employed by Consolidated, Kidder, Interconnect, and/or MTTR to engage in a strike or a refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or perform any service where the object is to force or require the said persons to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with GTE or Telenet Information Services, Inc. or its assigns and successors.

2. Take the following affirmative action necessary to effectuate the policies of the Act

Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT induce or encourage any individual employed by Consolidated Electrical Construction Co., Interconnect Planning Corp., Kidder Peabody & Co., Inc., and/or MTTR, Inc. to engage in a strike or a refusal in the course of his employment to handle, use, manufacture, process, transport, or otherwise work on articles,

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[17] In *Andy Frain* the administrative law judge with Board approval looked at both the record before him and the union's history in deciding to issue a broad order. He noted that the union engaged in outright threats and had a stated policy of picketing the clients of firms that did not have a union contract. Similarly, in *L. M. Ericsson* the union's pressure on the neutral employer stemmed from its stated "total job policy," a factor which the Board relied on in issuing a broad order. See also *Electrical Workers IBEW Local 3 (General Dynamics)*, 264 NLRB 705 (1982).

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

materials, commodities, or to perform any service where the object is to force or require the above companies to cease using, selling, handling, transporting, manufacturing, or otherwise dealing in the products of GTE, or to cease doing business with GTE Telenet Information Services, Inc. or its assigns and successors.

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO